IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM,
1977

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NO. 77-975

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OLIVER PAUL SUMMERS,
Petitioner

vs.

STATE OF ALABAMA,
Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * *

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OLIVER PAUL SUMMERS,
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* * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, OLIVER PAUL SUMMERS, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on the 24th of May, 1977, which judgment affirmed the conviction of OLIVER PAUL SUMMERS for the crime of robbery in the Circuit Court of Marshall County, Alabama.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Alabama has been reported at 348 So2d 1126, cert.den. 348 So2d 1136, and is attached hereto in Appendix A, infra, pp. A1 thru A26 .

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 24th of May, 1977, and is annexed hereto in Appendix A, infra, p.A27 .

A timely petition for rehearing was denied on the 28th of June, 1977, and the judgment of the Court of Criminal Appeals of Alabama thereon is in Appendix A, infra, p. A27 .

A petition for writ of certiorari timely filed in the Supreme Court of Alabama was denied on the 26th of August, 1977, and the order thereon is in Appendix A, infra, p.A28 .

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on the 24th of May, 1977, is 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether or not Alabama denied to petitioner SUMMERS the right to compulsory process for compelling the attendance of two witnesses by means of depositions, such right being guaranteed by the Sixth Amendment, Constitution of the United States, as the same is made applicable to the State

of Alabama by operation of the Fourteenth Amendment, Constitution of the United States, where Alabama denied a continuance within one month after arraignment so as to permit the completion of the interrogatory process which had been initiated by petitioner SUMMERS.

II.

A subsidiary, and necessarily included question, is whether or not Alabama denied petitioner SUMMERS that due process of law guaranteed by the Fourteenth Amendment, Constitution of the United States, by the refusal of a requested continuance predicated upon the completion of the interrogatory process of two witnesses, which continuance was denied in the time period of the one month, approximately, which elapsed between arraignment and trial.

III.

Whether or not an appellate court denies to an appellant that due process of law guaranteed by the Fourteenth Amendment, Constitution of the United States, where it relies in its affirmance upon facts which have been ruled out by the trial court, and where no other facts in the record support the conclusion of the appellate court for its affirmance.

IV.

Whether or not petitioner SUMMERS was denied that due process of law guaranteed by the Fourteenth Amendment, Constitution of the United States, where the prosecutor was permitted in argument at closing to refer to petitioner SUMMERS as a "safe specialist", which statement was not predicated upon evidence of prior crimes of that nature.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I.

Constitution of the United States, Amendment VI:

> In all criminal proceedings, the accused shall enjoy the right *** to have compulsory process for obtaining witnesses in his favor,***

II.

Constitution of the United States, Amendment XIV, Section 1:

> Section 1. ***nor shall any state deprive any person of life, liberty, or property, without due process of law; ***

III.

Title 28, Section 1257(3), United States Code:

> Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

***

> (3) By writ of certiorari, *** where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, *** the United States.

STATEMENT OF THE CASE

Petitioner SUMMERS was proceeded against by the State of Alabama in the Circuit Court of Marshall County, Alabama, for the criminal offense of robbery, such robbery having occurred allegedly on the 20th of August, 1975.

The salient and pertinent facts to support the indictment produced on the trial of this cause are delineated in the opinion of the Court of Criminal Appeals, and, in the interest of conserving time and space, shall not be repeated at this point. However, certain matters which were not admitted into evidence at the trial level shall be set forth later.

Of particular import here, however, and especially in connection with Questions I and II for which review is sought, the proceedings concerning the two witnesses which petitioner SUMMERS attempted to depose by interrogatories under the provisions of applicable Alabama law must be presented at greater length.

After arraignment and within the one month prior to commencement of trial, petitioner SUMMERS commenced proceedings to obtain the testimony of two witnesses who were incarcerated in two different places of confinement. This procedure in Alabama envisions written interrogatories, and is, of necessity, time-consuming.

Because this procedure could not be completed prior to the commencement of the trial, the attorneys for petitioner SUMMERS moved for a continuance to permit these interrogatories to be answered, which motion was DENIED. Thus, these questions were presented at the first opportunity, and were decided adversely to petitioner SUMMERS. Also, on appeal, the Court of Criminal Appeals of Alabama held the trial court did not abuse its discretion in denying the requested continuance because "there was absolutely no showing what the testimony of these witnesses would be."

During the closing arguments, the prosecuting attorney for the State of Alabama commented with reference to petitioner SUMMERS' having threatened a State witness. At the trial, this was objected to as being prejudicial and inflammatory, and the trial court instructed the jury to disregard the remark in reaching its decision. However, the appellate court in its opinion of affirmance held the statement was fully supported by the evidence. Of course, this remark was not allowed to go to the jury, but the question remained as to whether or not a

mistrial should have been in order. Thus, the Court of Criminal Appeals of Alabama used in its opinion statements which were not before the jury, and denied to petitioner SUMMERS a proper review of his contentions about prejudice leading to a new trial.

Petitioner SUMMERS during the course of the trial objected to the admission into evidence of certain testimony that he was ready to open safes. The trial court sustained the objection to these conclusions, but on affirmance the appellate court specifically stated that this was the purpose of the alleged attendance by petitioner SUMMERS on the date of the robbery. It further used this statement to reach the conclusion that denominating petitioner SUMMERS a "safe specialist" by the prosecuting attorney in closing argument was a legitimate inference from the evidence. Hence, there was no prejudicial argument to the jury, the court concluded.

The foregoing matters were raised at the first opportunity in the trial court, or were generated by the Court of Criminal Appeals in its opinion. The issues raised at trial level were briefed on appeal; and the matters adjudicated adversely to petitioner SUMMERS.

There are properly presented federal constitutional questions and issue before this Court.

REASONS FOR GRANTING THE WRIT

A. The denial of a continuance to permit a defendant in a criminal case to complete the established procedures for obtaining testimony by interrogatories on depositions is a denial of due process and the right to have compulsory process for obtaining witnesses.

The right of a defendant in a criminal case under the Sixth Amendment to have compulsory process for obtaining witnesses in his favor is made applicable to the States through the Fourteenth Amendment, since the right is so fundamental, and essential to a fair trial. Washington v. Texas, 388 US 14 (1967).

The case on the immediate question of a continuance where out-of-state witnesses were involved that still is law apparently is Minder v. Georgia, 183 US 559(1902). This Court held there was not a denial of due process because it was not within the power of a state to compel the attendance of witnesses beyond the limits of the state. This Court further stated that due process was not denied because there was no provision in state law for out-of-state depositions.

However, Alabama law does provide that a defendant may take a deposition of a witness who is out-of-state, OR, as in this case, a witness who is in prison. Both of the witnesses here were in pri-

son, either in Alabama or in Florida. In this case, petitioner SUMMERS properly commenced the procedures outlined in the Alabama statute, but within a one month period could not complete these procedures, although such procedures were not being used for delay by petitioner SUMMERS.

Then, a continuance was requested in order to allow the completion of the procedures, and the trial court denied the motion, and petitioner SUMMERS was put to trial within one month of arraignment and without any assistance which may have accrued to him by having the testimony of these witnesses. The point becomes crucial when it is realized that petitioner SUMMERS was not alleged to have been present at the scene of the robbery, and that the testimony of an admitted robber was used by the State of Alabama to prove the involvement of petitioner SUMMERS.

Petitioner SUMMERS is aware of Lisenba v. California, 319 US 219(1941), wherein this Court ruled that a continuance was not required to meet Fourteenth Amendment due process requirements merely to answer the contentions of the prosecution, and that this Court would not inquire into whether the California court abused its discretion in so denying a continuance.

However, that case was decided before Washington, as was Minder, and, hence,

Sixth Amendment considerations were not involved.

In the posture of this case, petitioner SUMMERS properly commenced the utilization of statutory procedures to obtain testimony of witnesses who were in prison or otherwise confined. However, the inherent time factor involved in the utilization of these statutory procedures made them of no value to petitioner SUMMERS since they could not be completed prior to the trial date. A continuance for this purpose was denied, and the denial was upheld by the Court of Criminal Appeals of Alabama.

A matter near of kin to the present one was decided by the Court of Criminal Appeals in Sparks v. State, 46 Ala.App. 357, 242 So2d 403, adverse to a criminal defendant, and this Court denied certiorari when the question was presented, October Term, 1970, No. 1462. These are, therefore, recurring problems in the administration of criminal justice by the States, and this question shall remain troublesome until decided by this Court.

B. An appellate court by relying upon excluded matter in the trial court for an affirmance denies to an appellant in a criminal case due process of law.

Petitioner SUMMERS had protected himself and the record in this case by ob-

jecting to certain matters in the argument of the prosecuting attorney for the State of Alabama. These objections were sustained, and tne trial court admonished the jury to exclude the remarks, and in the case of evidence, the evidence, from their consideration in determining guilt or innocence.

Notwithstanding this record, the Court of Criminal Appeals of Alabama, in the instances noted above, used the excluded evidence to sustain the non-prejudicial nature of argument by the prosecuting attorney.

This proposition concerning that use by the Court of Criminal Appeals of Alabama appears to be novel, and no case has been located which speaks to the proposition.

However, it would appear to be sound reasoning that an appellate court can violate the due process standards as well as a lower court, or trial court.

The statements of the prosecuting attorney would be improper argument leading to and compelling a reversal if such statements were not fair comment on the evidence. Hence, such statements are not with any basis when, as here, such statements are found by the appellate court to be predicated upon evidence which had been excluded from consideration by the jury. Thus, the appellate court has premised its affirmance upon a completely

erroneous basis, and thereby deprived petitioner SUMMERS of that due process guaranteed to him by the Fourteenth Amendment, Constitution of the United States. It will be noted that the prosecuting attorney for the State of Alabama was well aware that the basis for his argument had been ruled out by the trial court. This leads to the conclusion there was a deliberate action on the part of the State of Alabama to procure a conviction notwithstanding any right or rights of petitioner SUMMERS.

The impact of such comments reached a peak when the prosecuting attorney denominated petitioner SUMMERS a "safe specialist" in closing oral argument, and, as we have shown, there was no basis in fact for this argument.

Prosecutorial comment may give rise to a federal constitutional question in the context of that fair trial which is part and parcel of the Fourteenth Amendment, Constitution of the United States. See Donnelly vs. DeChristofore, 416 US 637. See also Hall v. United States, 419 F2d 582 (5th Cir.1969), wherein this question is discussed in detail.

Petitioner SUMMERS submits that the characterization in the present case, approved by the Court of Criminal Appeals of Alabama, went beyond any permissible fair comment in violation of his Fourteenth Amendment rights.

A general question is not presented here; the specific question is whether characterizations presented without underlying evidence can stand federal constitutional muster. This Court is not asked to go into the thicket of the many, many factual situations involving what is or is not fair comment when there is evidence before the jury.

CONCLUSION

Petitioner SUMMERS submits the petition for writ of certiorari to the Court of Criminal Appeals of Alabama is due to be granted so that the questions may be fully briefed and argued.

JANUARY, 1978

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APPENDIX

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1976-77
8 Div. 943 MAY 24, 1977

Oliver Paul Summers, alias
v.
State

Appeal from Marshall Circuit Court

HARRIS, JUDGE

Appellant was convicted of robbery and the jury fixed his punishment at 15 years in the penitentiary. He was arraigned in the presence of his retained counsel and interposed a plea of not guilty. After conviction and sentence appellant gave notice of appeal.

Omitting the formal parts the indictment reads as follows:

> "The Grand Jury of said County charge that before the finding of this indictment Oliver Paul Summers, alias Paul Summers,alias Frank Summers, whose name to the Grand Jury is otherwise unknown, feloniously took, to-wit: Five Thousand Five Hundred Fifty Nine Dollars in lawful paper currency of the United States of America, the exact denominations of the bills being unknown to the Grand Jury, the property of Marjorie Cherry, from Joseph Cherry and

"Marjorie Cherry, against their will, by violence to their persons, or by putting them in such fear as unwillingly to part with the same, against the peace and dignity of the State of Alabama."

This case was tried on the evidence adduced by the State. Appellant did not testify nor did he offer any evidence in his behalf. When the State rested, appellant made a motion to exclude the State's evidence on the ground the State's case was based upon the uncorroborated testimony of accomplices. This motion was overruled and denied.

Mrs. Marjorie Cherry testified that she and her busband lived on the Kilpatrick Highway in Boaz, Alabama, and that she and her husband owned and operated the Sand Mountain Auto Auction located on Highway 431 near Boaz, Marshall County, Alabama. She stated they conducted an automobile auction every Wednesday and at times took in large sums of money. They had an auction on Wednesday, August 20, 1975, and she carried the proceeds from the auction sales to her home and hid the money in a clothes hamper in the bathroom and was going to make a bank deposit the next day.

Mrs. Cherry further testified that she and her husband were in their home on the evening of August 20, 1975. She stated at approximately 7:30 p.m. she was in the kitchen and heard the doorbell ring. Her husband went to the door and she heard him

say, "I'll get my wife." A few minutes later her husband walked in the kitchen followed by a man holding a pistol in his hand. The man with the pistol said, "This is a holdup. I am a professional; I'm not working alone. If you do exactly as I say, you'll not be hurt."

The man with the gun ordered Mr. and Mrs. Cherry to go into the bedroom and lie face down on the bed. Mrs. Cherry protested that she recently had surgery and could not lie face down and the man said, "That's alright, Mrs. Cherry, lie on your back." The man with the pistol ordered Mr. Cherry to lie face down on the bed and he told the man that he had a heart condition and the man told him to lie on his side. The man placed a pillow over Mrs. Cherry's face and a small rug over Mr. Cherry's face. He then taped their hands and ankles together.

Mrs. Cherry further stated that besides the man with the gun another man also entered the house and while the man with the gun stood guard over them, she heard the other robber going through the house opening doors and drawers. The robber with the gun kept asking, "Where is the safe?" Mrs. Cherry told him there was no safe in the house. The man then asked about their coin collection and Mrs. Cherry told him it was in the bank. The robbers found two shoe boxes full of coins in one of the closets and took them.

The robbers asked Mrs. Cherry where

the money was and she told them she did not bring the money home that day but had given it to her brother to deposit. The man with the gun told her he did not believe that she had given the money to her brother to deposit and that the money was somewhere in the house. The bandit with the gun told Mr. Cherry, "If you don't make her tell me where the money is, I'm going to have to start working on you." Mr. Cherry told his wife to please tell the men where the money was and she told the robbers that the money was in the bathroom in the clothes hamper. This money was the proceeds from the auction sale that day and the amount of it was $5,559.00.

The bandits then took Mr. Cherry's billfold and watch and they removed all the jewelry Mrs. Cherry was wearing. They also took a jewelry case containing watches, diamond rings, diamond pins, wedding band and other items of jewelry. The bandits were in the Cherry home a total of about 45 minutes and as they were leaving they took the keys to both automobiles but drove away in only one of the cars.

Mrs. Cherry further testified that she had a burglar alar, system installed in her house. She tried to activate the alarm system when she first saw the bandit with the pistol, but the system had been turned off earlier when Mr. Cherry had gone to the back porch. Mr. Cherry stated that in April, 1974, the telephone lines leading to the house had been cut,

setting off the burglar alarm and at that time no burglary was committed.

Mrs. Cherry identified an envelope, marked State's Exhibit 1, containing seven items of jewelry as being part of the jewelry the bandits took the night of the robbery at the same time they took the money aggregating $5,559.00. State's Exhibit 1 was admitted into evidence without objection. Mrs. Cherry specifically identified this jewelry as a yellow-gold pin with rhinestones and matching gold earrings, spiral earrings with pearls, a wedding band with a quarter carat solitaire and an engagement ring.

Donald Nissen testified that he had previously entered a plea of guilty to the robbery of Mr. and Mrs. Cherry and had received a sentence of 15 years.

Nissen testified that the robbery had been planned at the home of the defendant Paul Summers in Clanton, Alabama. Nissen testified that present at the time were Danny McClellan, Danny Register and Bull Poe. Nissen testified that Danny McClellan is presently doing a natural life sentence in the Florida State Penitentiary. He testified that Bull Poe is currently serving two life sentences in Alabama. And he said that Danny Register is currently in jail waiting to go to the penitentiary. Nissen testifed that the discussion concerning robbing the Cherrys took place approximately six weeks to two months before the robbery occurred.

At this meeting at Summers's house, Summers told the group that he had been up to the Cherrys' house in Marshall County and "looked at it with the intention of burglarizing the house to rob a safe with someone else." Summers said that due to the fact there was a burglar alarm on the house they were not able to enter the house and that he wanted the group to go up there and look at the house with him with the thought of robbing Mrs. Cherry at gunpoint. Summers said that there would be no one there but Mrs. Cherry herself.

A few days after this meeting Nissen, Poe, Register, McClellan and the defendant Summers drove to Boaz to rob Mrs. Cherry. When they arrived they found that Mrs. Cherry had remarried and, because they were uncertain as to who her new husband was, and how many people might now be living in the house, plans to rob the house and its inhabitants were postponed.

Nissen testified that some five or six weeks later in August of 1975 a group consisting of himself, Danny McClellan, Bull Poe, Paul Summers, Jimmy Thomas and Rusty Zinghan left for Boaz from the defendant's car lot in Clanton early in the morning. McClellan, Poe and Summers were traveling in Summers's Lincoln Continental. Zinghan, Thomas and Nissen were traveling in a black 1965 Oldsmobile which they got from the defendant Summers's car lot in Clanton.

On the way to Boaz they stopped just south of Birmingham in the town of Hoover and robbed a family in that community around midmorning. Following this robbery the group traveled to Boaz and arrived there approximately two hours before dusk.

The group assembled in the Holiday Inn parking lot in Boaz and traveled in one car to the Cherrys' house. The house was pointed out to the group by the defendant Summers. They all then returned to the Holiday Inn. At that time Zinghan, Thomas and Nissen got in the black 1965 Oldsmobile and drove around waiting for nightfall. McClellan, Poe and Summers waited behind for them at the Holiday Inn in Summers's Lincoln Continental.

After nightfall Nissen, Zinghan and Thomas drove to the Cherry residence and Nissen and Thomas went to the front door. Zinghan waited in the car. After gaining entrance to the house on the ruse that they had some cars to sell, Nissen and Thomas proceeded to tie up and rob Mr. and Mrs. Cherry.

After entering the house Nissen returned to the front door and notified Zinghan, who was waiting outside in the car, to leave. Following the robbery Nissen and Thomas left in one of the Cherrys' cars. They drove to the Holiday Inn parking lot where they met McClellan, Poe and the defendant Summers.

Nissen had a suitcase he had taken

from the Cherrys' house in which he had placed the guns used in the robbery and the money and jewelry obtained during the robbery he put in an attache case. Nissen gave this suitcase and the other case to Paul Summers. Summers took both cases and threw them in the back of his Lincoln Continental. After hiding the Cherrys' Oldsmobile in a field, Nissen, Zinghan, Thomas and Poe met with McClellan and the defendant Summers at a truck stop. At that time McClellan counted out $500 each from the proceeds of the robbery to Thomas and Zinghan. Following this, Poe and Nissen took Zinghan and Thomas to Birmingham where Zinghan and Thomas boarded a plane to Tampa, Florida.

After dropping off Zinghan and Thomas at the airport in Birmingham, Nissen and Poe drove to Clanton where they met Summers and McClellan at Summers's car lot. There they parked the 1965 black Oldsmobile that they had used in the robbery back in the car lot and removed the license plates that had been used in the robbery from it.

The four, Nissen, Poe, McClellan and Summers then went inside the office of the car lot and divided up the money and jewelry that had been taken in the robbery. Nissen testified that Summers's share of the money taken in the robbery was approximately eight or nine hundred dollars. All of the silver coins taken from the robbery were left at the office of Summers's car lot. Summers was supposed to take the silver coins and "turn

them into cash." Part of the jewelry was taken by Danny McClellan and the rest was left in Clanton with the defendant. Nissen got a Longine watch for part of his share of the jewelry.

Nissen then identified several items of jewelry that had been taken in the robbery and previously identified by Mrs. Cherry.

Nissen testified that the defendant Summers had provided the license plates which were placed on the automobiles used in the robbery.

On cross-examination Nissen testified that he had also pled guilty to two second degree burglary charges in Houston County, Alabama and received a 15 year sentence, concurrent with the 15 years he received in the Cherry robbery. Nissen testified that he had an agreement with the State of Alabama whereby he was to receive a total of 15 years imprisonment for the commission of some six robberies and two burglaries.

On redirect Nissen testified that Summers came along on the trip to Boaz "in case we had to open a safe, to open the safe for us at the first place that we had robbed that day," (the robbery that had occurred in Hoover earlier on the same day as the Cherry robbery). Summers had brought along safe cracking tools on the trip.

Elaine McClellan testified that her husband, Danny McClellan, is presently serving a life sentence in the State of Florida.

Mrs. McClellan identified several items of jewelry that had been previously identified as coming from the Cherry robbery. She testified that she first saw the items of jewelry at the defendant Summers's car lot in Clanton in late August or early Septembed of 1975. She testified that she and her husband Danny McClellan had driven up to the defendant's car lot from their home in Dothan.

When they arrived at the car lot they were met by the defendant Paul Summers. The three of them went into the office at Paul Summers's car lot. Upon entering the office her husband, Danny and the defendant Summers went into a side office. Shortly afterward they returned. As they returned she saw the defendant Summers handing to her husband a small white box. At the time she saw Summers hand the box to her husband she heard Summers say, "This is the rest of the jewelry from the score off the mountain." She also heard Summers say that the jewelry came from the lady who owned the auction in Boaz.

Later, on the way back to Dothan in the car she looked into the box and saw the items of jewelry which she had previously identified and two wristwatches- a man's and a woman's. The man's wristwatch was given by her husband to her younger brother and the woman's wristwatch was

pawned in a pawnshop in Tampa, Florida. The rest of the jewelry remained at her house until the investigation into this case began and was turned over to Lieutenant Stokes of the Dothan Police Department.

Mrs. McClellan also testified that during the time she and her husband were at the defendant's car lot in Clanton she heard Summers complaining to her husband "that Don(Nissen)had held out some things off the mountain." Summers also said at the time that it wasn't the first time that Nissen had "held out some things from a score that I had set up."

Mrs. McClellan also testified that Summers was complaining at the time to her husband about Don(Nissen) and Jimmy (Thomas) having screwed up a job in Columbiana the same day.

The witness also testifed that a few months preceding the trial she received a telephone call from the defendant Summers at her residence in Dothan. During the conversation the defendant asked her if she had "heard about Wormy (Donald Nissen) being picked up in the blue Mark IV" in Florida. Summers also said that he Summers, had heard that "Don (Nissen) and Danny (McClellan) had gotten together and talked to the big men." Mrs. McClellan testified that Summers also told her that if Bull (Poe) had done the job right that he would "not be where he is at today." Summers also said that he was having to send money to

Poe to keep his mouth shut.

Mrs. McClellan also testified that just a few pweeks prior to the trial she received another telephone call from the defendant Summers at her home in Dothan. During the conversation Summers asked her if she was going to be a State's witness in the case against him. She testified that he said, "I don't hurt women or anything, but are you a State's witness?"

On cross-examination Elaine McClellan testified that she had worn some of the stolen jewelry she had previously identified prior to turning it over to the Dothan Police Department. She stated that she turned the jewelry over to Lieutenant Stokes of the Dothan Police Department when she learned that Donald Nissen had been arrested. She testified that no case was currently pending against her for buying, receiving or concealing stolen property. She testified that she did not have a felony record.

Mrs. McClellan testified that the life sentence her husband Danny McClellan was serving in Florida was a natural life sentence for a murder committed during the course of a robbery. She stated that McClellan would not be eligible for parole for 25 years.

Following the testimony of Elaine Campbell McClellan it was tipulated by the attorneys for the State and for the defense that the case had been brought in the proper venue.

Appellant contends that the indictment in this case is void and would not support the judgment of conviction. We do not agree.

This Court has held many times that there are three essential elements of the crime of robbery. They are: (1) felonious intent, (2) force, or putting in fear as a means of effecting the intent, and (3) by that means taking and carrying away of the property of another from his person or in his presence, all of these elements concurring in point of time. Tarver v. State, 53 Ala.App.661, 303 So2d 161; Crutcher v. State, 55 Ala.App.469, 316 So2d 716.

The constitutional right of an accused to demand the nature and cause of the accusation against him is not a technical right, but is fundamental and essential to the guaranty that no person shall be deprived of his liberty except by due process of law, nor be twice put in jeopardy for the same offense.

An indictment should be specific in its averments in four prime aspects to insure this guaranty: (a) to identify the accusation lest the accused should be tried for an offense different from that inetended by the grand jury; (b) to enable the defendant to prepare for his defense; (c) that the judgment may inure to his subsequent protection and foreclose the possibility of being twice put in jeopardy for the same offense, and (d) to enable the Court, after conviction,

to pronounce judgment from the record.

The indictment in this case practically tracks the form prescribed by the statute for the offense of robbery. Title 15, Section 259, form 95, Code of Alabama 1940.

Appellant claims that the indictment does not sufficiently charge the offense of robbery because it does not contain the formal wording "from the person of or in the presence of" in referring to the taking of the property from the victims.

In Hardis v. State, 28 Ala.App.524, 189 So.216, was held good an indictment charging the defendant with "having feloniously taken one automobile truck of the value of $500, and meal of the value of $10, all of the aggregate value of $510, the property of I.N. Stewart, from his person, and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same." It will be noted that the words "in the presence of" were omitted from the indictment in Hardis, supra.

Title 15, Section 232, Code of Alabama 1940 provides,in pertinent part, that an "indictment must state facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to promounce the proper judgment;. ."

The indictment in this case is couched in language so clear that any person of common understanding would know that the crime of robbery was charged against appellant.

Cases in other jurisdictions which have considered this same issue clearly hold that the words "from the person of or in the presence of" are not necessary in an indictment for robbery as long as it can be reasonably inferred that the property in question was taken from the person of, or under the control of, the victim of the robbery. See Salzer v. Maxwell, 173 Ohio St.573, 184 N.E.2d 396; People v. Franklin, 22 Ill.App.3d 775, 317 N.E.2d 611; State v. Oliver, 32 Ohio St.2d 109, 290 N.E.2d 828; People v. Williams, 403 Ill. 248, 85 N.E.2d 828; Smyth v. White, 195 Va. 169, 77 S.E.2d 454.

In Salzer v. Maxwell, supra, the appellant complained that the indictment did not contain the words "from the person of" and contended the omission of those words rendered the indictment defective in not alleging an essentail element of the crime.

The Ohio Supreme Court specifically upheld the indictment saying:

> "All of the provisions of the statute were contained therein except the phrase, 'from the person of' and, when the allegation, 'did steal' from Chester Schubert, is read in conjunction with the

"remainder of the indictment, it is clear that the currency was taken from the person of, or that the currency was under his immediate control at the time of the theft."

Appellant appeared along with his retained counsel at his arraignment approximately one month prior to the date of his trial. At his arraignment appellant received, read and signed a printed copy of his legal rights in the presence of his attorney. This document informed appellant that he was charged with the offense of robbery, and explained the minimum and maximum sentences to him and his legal rights. There was a colloquy between the Court and appellant during the arraignment proceedings in which appellant informed the Court that he had read and understood his legal rights contained in the printed document and that it was notnecessary for the Court to explain his rights in more detail. At appellant's arraignment the Court expressly told appellant, "The Grand Jury of this County has returned an indictment against you; that indictment charges you with robbery." The indictment was read to appellant in the presence of his attorney and a not guilty plea was entered at that time.

Although appellant was given more than two weeks after his arraignment to file any pleas or motions, no demurrer to the indictment or any motions challenging the sufficiency of the indictment were ever filed by appellant. At the time appellant made a motion to exclude the State's evi-

dence he did not question the sufficiency of the indictment in any form or fashion. The sufficiency of the indictment was raised for the first time on appeal.

We hold the indictment is sufficient to support the judgment of conviction.

Appellant contends that the trial court committed reversible error in denying his motion to exclude the State's evidence. The basis of this motion was that Mrs. McClellan was an accomplice in the robbery and there was no legal evidence to corroborate the testimony of Donald Nissen who was an admitted accomplice. The trial court charged the jury that Nissen was an accomplice as a matter of law and that the jury could not convict appellant on the uncorroborated testimony of Nissen. The Court further charged the jury that after considering all of the evidence in this case, "you determine that Elaine Campbell McClellan, that particular witness, was also an accomplice then you cannot convict the defendant in this case."

The testimony of Mrs. McClellan shows beyond any question that she was not an accomplice in the robbery of Mr. and Mrs. Cherry. She testified that she had seen appellant in his office hand a small white box to her common-law husband, Danny McClellan, and heard him state to her husband,"this is the rest of the jewelry from the score off the mountain." After leaving appellant's place with her husband she opened the box and found jewelry in it. She wore the jewelry for six

to nine months, knowing it was stolen, but without ever knowing from whom it had been stolen. She heard appellant say that the jewelry came from the lady who owned the auction in Boaz, but she did not know the name of the lady. It is clear that Mrs. McClellan had no prior knowledge of the robbery of Mr. and Mrs. Cherry and had no knowledge where the stolen jewelry had come from other than hearing what appellant told her husband at the time appellant gave the box to her husband.

The following cases demonstrate that Mrs. McClellan was not an accomplice in the robbery of Mr. and Mrs. Cherry: Childs v. State, 43 Ala.App. 529, 194 So.2d 861; Dye v. State,25 Ala.App. 138, 142 So.111; Belser v. State, 16 Ala.App.504, 79 So.265.

The testimony of Mrs. McClellan was more than ample and sufficient legal corroboration of the testimony of Donald Nissen, an admitted accomplice.

Next appellant contends that the trial court committed reversible error in allowing testimony concerning the robbery in the Hoover-Columbiana area on the same day and date and by the same parties who robber the Cherrys at Boaz, Alabama.

In Jackson v. State,229 Ala.48, 155 So.581, the Supreme Court held:

"Evidence of other and distinct criminal offense, at other times and places, is admitted in evidence only in exceptional cases and for limited purposes. Among these are cases where such evidence may throw light on the motive, intent, scienter, or identity, and so tend to establish the guilt of the party of the offense for which he is being tried. The details of such other crimes are not admissible, except in so far as essential to disclose the motive or other matter for which it is admitted. Gassenheimer v. State,52 Ala.313; Ingram v. State, 39 Ala.247, 84 Am.Dec.782; Moore v. State,10 Ala.App.179, 64 So.520; Davis v. State, 213 Ala.541, 105 So.677.

"But this case is governed by another and different principle. Everything constituting the one continuous transaction is admissible as of the res gestae. No matter how many distinct crimes may be involved, all the details of the one continuous criminal occurrence or adventure may be considered by the jury in passing upon the culpability, the wickedness, and depravity of the crime for which the party is being tried. In cases of robbery the jury is given a wide range of discretion in fixing the punishment. They may look to all the circumstances

"constituting part of the res gestae in meting out punishment within the limits prescribed by law. It follows all these circumstances are the subject of legitimate argument on the part of the solicitor. Ingram v. State, supra; Kennedy v. State, 182 Ala.10, 62 So.49; Smith v. State,88 Ala.73, 7 So.52; 16 C.J. Section 1115."

The case of Lowe v. State, 134 Ala. 154, 32 So.273, dealt with the prosecution for larceny of 18 head of cattle from a farm in Macon County. While the defendants were driving away with the 18 head of cattle they stopped and picked up a bull that belonged to another person and carried the cattle and the bull to Montgomery. The Supreme Court held that everything that happened on the drive from the first farm to the second farm and then on to Montgomery was part of the same transaction and admissible against the defendants.

In Parsons v. State, 251 Ala.467, 38 So.2d 209, the defendant was tried for robbing a man at his home, of a set of keys. The State was permitted to prove, over objections, that the automobile to which the keys belonged was then used by the thief in committing a burglary. The Supreme Court said:

"But the rule is that if several crimes in fact constitute one criminal transaction, evidence of all such crimes may be given

"as part of the res gestae of the offense with which the defendant is charged."

Numerous cases to the same effect are collected in Ala.Dig.Crim.Law, Key No. 365(1).

We hold that evidence of the robbery in the Hoover-Columbiana area which was committed by the same parties and on the same day and date as the robbery of Mr. and Mrs. Cherry at Boaz was properly admissible as of the res gestae and constituted one continuous criminal occurrence or adventure.

Finally appellant contends that the prosecuting attorneys committed reversible error during their closing arguments to the jury wherein the prosecutors referred to appellant as (1) a "safe specialist"; (2) asked the jury to "put the defendant out of circulation for a substantial time to make sure that he will have reached the age of maturity by the time he walks the streets again, and that he will be mature enough not to go back on the job of setting up robberies all over the state"; and (3) because the prosecuting attorney charged the defendant with threatening a witness for the state.

It is settled law that counsel both for the State and the defendant are allowed wide latitude in drawing deductions from the evidence in argument to the jury. Johnson v. State, Ala.Cr.App.,

335 So.2d 663; Colston v. State, Ala.Cr.App.,326 So.2d 520; Edson v. State, 53 Ala.App.460, 301 So.2d 226.

In Edson v. State, supra,this Court said:

> "Every fact the testimony tends to prove, every inference counsel may think arises out of the testimony, the credibility of the witnesses, as shown by their manner, the reasonableness of their story, their inetlligence, menas of knowledge, and many other considerations, are legitimate subjects of criticism and discussion. So, the conduct of the accused, his conversation (if in evidence), may be made the predicate of inferences, favorable or unfavorable."

In Johnson v. State, supra, it was recognized that "comments, even though hard hitting, which may arise from reasonable inferences from the evidence are permissible."

In Colston v. State, supra, this Court held:

> "There is no legal standard by which the prejudicial qualities of improper remarks of a District Attorney in the trial of a case can be gauged. Each case must be determined on its own merits."

In Edson v. State, supra,we further observed:

> "It is both the duty and right of counsel to present the case of his client, whether it be the State or a defendant,as fully and forcibly as the evidence, its tendencies and the inferences therefrom may justify. Within these limits, the widest range of discussion should be accorded."
>
> "The rule in this State is well established and has been often cited. It is as follows: 'The statement must be made as a fact; the fact stated must be unsupported by any evidence, must be pertinent to the issue or its natural tendence must be to influence the finding of the jury . ."(Emphasis in the original).

The evidence adduced was crystal clear that on the day in question, the appellant and five associates left from appellant's car lot in Clanton, Alabama, for the express purpose of committing two robberies that same day-one in the Hoover-Columbiana area south of Birmingham and the other at Boaz, Alabama, at the home of Mr. and Mrs. Joseph Cherry. The evidence showed that in addition to providing the information conerning the places to be robbed the appellant furnished the vehicles with false license plates to be used as transportation to the designated places. Appellant went along with a set of burglary tools or safe cracking tools, to open

safes in the event his services were needed or required.

In the light of this evidence reference to appellant as a "safe specialist" was a legitimate inference to be drawn by the prosecuting attorney in his argument to the jury.

For analogous authorities see the cases of Jeter v. State, Ala.Cr.App.,339 So.2d 91, a worthless check case where a prosecutor referred to the defendant as a "flim flam artist", and Matthews v. State, 42 Ala.App.406, 166 So.2d 883, a stolen property case where the prosecutor referred to the defendant as a "fence". This Court held that the argument of the prosecutor in both of these cases "falls in the scope of proper argument as being a reasonable inference from the evidence as presented."

With reference to the argument of the prosecuting attorney in requesting the jury to put appellant out of circulation for a substantial time to keep him from setting up robberies all over this State we think this argument was no more than an appeal to the jury to convict appellant and, thus, protect society from the commission of similar crimes. Witt v. State, 27 Ala.App.409, 174 So.794; Hawes v. State, 48 Ala.App.565, 266 So.2d 652; Barnett v. State, 52 Ala.App. 260, 291 So.2d 353.

It can be fairly said that the testimony showed that appellant "set up",

conceived, planned and participated in the robbery of the Cherrys' home in Boaz. Added to this is the testimony of Mrs. McClellan that appellant said that it "wasn't the first time that Nissen held out some things from a score that I had set up."

The argument with reference to appellant threatening a State witness is fully supported by the record. Mrs. McClellan testified that appellant called her on the telephone and stated, "I don't hurt women or anything, but are you a State's witness?" The clear implication of this testimony was a warning to Mrs. McClellan that she would be in danger if she showed up at appellant's trial and testified against him. This was a proper subject of comment by the prosecutor.

Appellant filed interrogatories to two witnesses who were either in jail in Alabama or in prison in Florida. These interrogatories were filed the day before appellant moved for a continuance so that these witnesses would have time to answer these interrogatories. There was absolutely no showing what the testimony of these witnesses would be. The trial court did not abuse his discretion in denying appellant's request for a continuance under the circumstances of this case. Brown v. State, 247 Ala.288, 24 So.2d223; Sparks v. State, 46 Ala.App. 357, 242 So.2d 403.

We have carefully searched the record for errors injuriously affecting the

substantial rights of appellant and have found none.

The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur.

STATE OF ALABAMA)
MONTGOMERY COUNTY)

8th Div. 943

Oliver Paul Summers, alias
v.
State
Marshall Circuit Court No. 76-250A

May 24, 1977

Come the parties by attorneys, and the record and matters therein assigned for erros(sic), being submitted on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

June 28, 1977

It is ordered that the application for rehearing be and the same is hereby overruled.

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the above judgment and order on application for rehearing are true, full and correct copies of the same as they appear and remain of record and on file in this office.

WITNESS, Mollie Jordan,
Clerk of the Court of
Criminal Appeals, this
20th day of December, 1977.
s/ Mollie Jordan
Clerk of the Court of Criminal Appeals of Alabama

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT
IN THE SUPREME COURT
OF ALABAMA

AUGUST 26, 1977

SC 2691

EX PARTE: OLIVER PAUL SUMMERS
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(RE: OLIVER PAUL SUMMERS V. STATE OF
ALABAMA)

The Petition for Writ of Certiorari to the Court of Criminal Appeals being duly submitted to this Court, IT IS CONSIDERED AND ORDERED that the petition be denied at the costs of the petitioner, for which costs let execution issue.

TORBERT,C.J., MADDOX, FAULKNER, SHORES & BEATTY, JJ., CONCUR